

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN R. SCHRUBB, NO. C-08-2986 TEH (PR)

Plaintiff,

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AFTER REMAND

JAMES TILTON, SECRETARY, et. al., (Doc. #58)

Defendants.

1

On June 2, 2008, Plaintiff, a California prisoner currently incarcerated at California Men's Colony, filed this pro se civil rights action under 42 U.S.C. § 1983 alleging that officials at Pelican Bay State Prison (PBSP) violated his constitutional rights while he was incarcerated at that facility. Specifically, Plaintiff alleged he was deprived of several items of personal property he ordered from prison-approved vendors, including a cap and a pair of shorts, and two children's books he ordered for his toddler son that inadvertently were sent to him in prison. Plaintiff alleged this deprivation of property violated his right to due process. Plaintiff also alleged an equal protection violation.

On March 29, 2010, the Court issued an Order Granting Defendants' Motion to Dismiss and for Summary Judgment. Doc. #42.

1 On the same day, the Court entered judgment in favor of Defendants.
2 Doc. #43. Plaintiff appealed and, on May 10, 2013, the Ninth
3 Circuit issued an Order affirming the judgment except for one claim
4 which was reversed and remanded. Doc. #50.

5 The Ninth Circuit held that Plaintiff had filed two
6 grievances with respect to his cap and shorts--(1) a grievance
7 regarding the prison's mail-out policy as applied to the cap and
8 shorts, and (2) a grievance regarding the destruction of the cap and
9 shorts--and that it was an abuse of discretion for this Court to
10 treat these grievances as one when analyzing whether Plaintiff had
11 exhausted them.

12 The Ninth Circuit directed that, on remand, even if the
13 Court found that the mail-out claim was exhausted, it should
14 determine whether the property destruction grievance was properly
15 exhausted or subject to improper screening. The Ninth Circuit noted
16 that, in regard to the property destruction grievance, there was no
17 evidence that Plaintiff had received notice that his cap and shorts
18 had been destroyed.

19 The Court issued an Order for briefing after remand.
20 Thereafter, Defendants filed a motion for summary judgment. Rather
21 than addressing exhaustion of Plaintiff's due process claim based on
22 the destruction of his cap and shorts, Defendants address the merits
23 of the claim and move for summary judgment on the ground that there
24 are no material facts in dispute and therefore they are entitled to
25 judgment as a matter of law. Defendants argue in the alternative
26 that, assuming their actions are found to be unconstitutional, it
27
28

1 would not have been clear to a reasonable official that such conduct
2 was unlawful and that therefore they are entitled to qualified
3 immunity.¹ Plaintiff has filed an opposition, and Defendants have
4 filed a reply.

5 II

6 The following facts are undisputed unless otherwise noted.

7 A

8 On or around August 23, 2005, Plaintiff received a knit
9 cap and shorts he had ordered through the mail from a prison-
10 approved vendor. Doc. #1 at 10. The shorts were several sizes too
11 small. Id. Plaintiff was informed by a staff member that the knit
12 cap was no longer allowed. Id. at 10 & 25. Plaintiff elected to
13 send both items back to the vendor. Id.

14 On September 9, 2005, in response to Plaintiff's inquiry
15 regarding the status of the items, Plaintiff was informed that he
16 did not have sufficient funds in his prison account (\$6.00) to
17 return the items to the vendor. Doc. #1 at 28.

18 On September 22, 2005, Plaintiff informed PBSP that he was
19 unable to obtain the \$6.00 needed to return the items. Doc. #1 at
20 30. He asked to be notified of any decision to destroy the items.
21 Id.

22 On November 15, 2005, Plaintiff sent PBSP officials

23

24 ¹ Defendants also filed a motion to dismiss the remaining due
25 process claim as against individual defendants Tilton, Horel, and Yax
26 on the grounds that Plaintiff failed to show a causal connection
27 between them and the alleged due process violation. As set forth
below, the Court finds that Defendants are entitled to summary
judgment on Plaintiff's remaining claim, thereby obviating the need
to address the motion to dismiss.

1 sixteen postage stamps and asked them to return the items for him.
2 Doc. #1 at 32.

3 On December 2, 2005, PBSP officials informed Plaintiff
4 that, per PBSP Operational Procedure No. 806, they were unable to
5 use postage stamps to return the items and explained that "all items
6 must go out via [United Parcel Service] for tracking purposes."
7 Doc. #1 at 34.

8 On December 20, 2005, Plaintiff informed PBSP officials
9 that due to his indigency, he was unable to pay for United Parcel
10 Service shipping to return the items to the vendor. Doc. #1 at 36.
11 PBSP officials suggested that Plaintiff get someone to supply him
12 with funds, which is the way Plaintiff was able to receive his
13 quarterly package. Id. Plaintiff responded that "the person who
14 provide[s] me with quarterly packages will not send me any funds, as
15 my account will bear out, because I have shown a propensity to
16 misuse my money." Id. at 38 (emphasis in original). In the same
17 correspondence, Plaintiff asked if he could use his "indigent
18 envelopes as payment." Id. On January 5, 2006, staff advised him
19 that he could not. Id.

20 In letters dated January 10, 2006, March 28, 2006, and
21 June 3, 2006, Plaintiff again asked to be provided with notice
22 before PBSP destroyed the property. Doc. #1 at 42, 44, 57.

23 On June 4, 2006, Plaintiff submitted a CDCR form 602
24 Inmate/Parolee Appeal Form grieving PBSP's refusal to allow him to
25 return the knit cap and shorts using United States Postal Service
26 postage stamps ("mail-out appeal"). Doc. #1 at 60.

1 On June 13, 2006, the PBSP appeals coordinator screened
2 out Plaintiff's appeal, checking a box that noted the appeal
3 "exceeds the 15 working days time limit, and the inmate has failed
4 to offer a credible explanation as to why he could/did not submit
5 the appeal within the time limit." Doc. #1 at 59. The appeals
6 coordinator also included a handwritten note that read: "You were
7 told you could not mail out property with \$6.00 [in] Jan. 2006."

8 Id.

9 On August 28, 2007, PBSP officials notified Plaintiff that
10 the thirty-day waiting period on his disallowed property, which had
11 been in PBSP storage since November 2006, had expired, and that his
12 property was destroyed on March 19, 2007 in accordance with
13 PBSP/CDCR policy. Doc. #1 at 14, 73.

14 On September 8, 2007, Plaintiff submitted a CDCR form 602
15 Inmate/Parolee Appeal Form grieving PBSP's disposal of his
16 disallowed property ("property destruction appeal"). Doc. #1 at 75.

17 On September 10, 2007, the PBSP appeals coordinator
18 screened out Plaintiff's appeal, explaining:

19 There has been too great a TIME LAPSE
20 between when the action or decision occurred and
21 when you filed your appeal with no explanation
22 of why you did not or could not file in a timely
23 fashion. Time limits expired per CCR 3084.6(c).
Therefore, if you would like to pursue this
matter further, you must submit an explanation
and supporting documentation explaining why you
did not or could not file your appeal timely.

24 YOUR "ISSUE" OF DISALLOWED PROPERTY BEGAIN
25 ON 1-10-06. THE FACT THAT YOU WERE RECENTLY
NOTIFIED OF ITS DISPOSITION DOES NOT PROVIDE YOU
WITH A NEW APPEAL ISSUE AND/OR NEW APPEAL TIME
CONSTRAINTS.

27

28

1 Doc. #1 at 79.

2 B

3 Plaintiff received a copy of PBSP Operational Procedure
4 No. 806 and read it before he ordered his shorts and cap from the
5 vendor. Doc. #32 at 59. Operational Procedure No. 806 provides, in
6 relevant part:

7 Personal Property Package Vendor Criteria

8

9 PBSP/CDCR shall not be a part of any
10 discrepancies between the vendor and the
11 purchaser. The vendor is responsible to correct
12 any errors in package contents. When an
incorrect item is received in a vendor package,
CDCR staff shall verify and may contact the
vendor to request a UPS call tag in order to
ship the incorrect item back to the vendor.
13

14 A verified copy of the shipping invoice
15 shall be maintained in the corresponding
inmate's property file in order to assist in the
resolution of any disputes between the vendor
and the purchaser. However, all disputes are
solely between the purchaser and the vendor and
must be settled without additional involvement
of PBSP and/or CDCR.
17

18

19 Processing Disapproved Property

20 Unauthorized inmate property, . . . shall
21 be disposed of in accordance with the provisions
of this section.
22

. . . .

23 3. Mail Out

24 At the inmate's expense, send the property
25 to an agreeable correspondence via UPS. This
option is not available for inmates with
insufficient funds in their trust account.
26

27

28

1 4. Appeal

2 File a [CDCR] 602, Inmate/Parolee Appeal
3 Form. Should the inmate desire to appeal, which
4 is one of the options, they must annotate and
5 sign the agreement form/Property Disposition
6 form to secure the right to appeal. Should an
7 inmate refuse to sign an agreement form
8 indicating one of the above choices, two
9 officers/witnesses shall document the refusal on
10 a [CDCR form] 128-B.

11 Doc. #24 at 5, 24-25 & 33 (PBSP Operational Procedure No. 806,
12 Sections VI. K & Y (emphasis added)).

13 An inmate with excess or non-permitted property may
14 voluntarily submit his property to prison officials for shipping.
15 Ducart Decl., Doc #24, at 2. The inmate must sign a "trust account
16 withdrawal form" to pay for the shipping costs. Id. A thirty-day
17 hold is placed on the inmate trust account to allow the inmate time
18 to obtain the necessary funds to pay the shipping costs. Id. If
19 the funds are not available after thirty-days, the property is
20 disposed of or donated. Id.

21 Currently, PBSP uses FedEx as the common carrier to ship
22 inmates' personal property. Id. At the time Plaintiff sought to
23 ship his items, PBSP used UPS to ship inmates' personal property.
24 Id. PBSP requires inmates to use a common carrier because the
25 common carrier identifies each parcel with a tracking number without
26 additional charge. Id. The tracking number permits PBSP to
27 determine if the parcel was received by the addressee. Id. Without
28 the tracking number, an inmate or addressee could claim that a
 parcel was never delivered when it had been. Id. at 2-3.

1 III
2 A

3 Summary judgment is properly granted when no genuine
4 disputes of material fact remain and when, viewing the evidence most
5 favorably to the non-moving party, the movant is clearly entitled to
6 prevail as a matter of law. Fed. R. Civ. P. 56(c); Celotex
7 v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N.
8 Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987). The moving party bears
9 the burden of showing there is no material factual dispute.
10 Celotex, 477 U.S. at 331. Therefore, the Court must regard as true
11 the opposing party's evidence, if supported by affidavits or other
12 evidentiary material. Id. at 324; Eisenberg, 815 F.2d at 1289. The
13 court must draw all reasonable inferences in favor of the party
14 against whom summary judgment is sought. Matsushita Elec. Indus.
15 Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel
16 Corp. v. Harford Accident & Indem. Co., 952 F.2d 1551, 1559 (9th
17 Cir. 1991).

18 The moving party bears the initial burden of identifying
19 those portions of the pleadings, discovery and affidavits which
20 demonstrate the absence of a genuine issue of material fact.
21 Celotex, 477 U.S. at 323. If the moving party meets its burden of
22 production, the burden then shifts to the opposing party to produce
23 "specific evidence, through affidavits or admissible discovery
24 material, to show that the dispute exists." Bhan v. NME Hosps.,
25 Inc., 929 F.2d 1404, 1409 (9th Cir 1991), cert. denied, 502 U.S. 994
26 (1991); Nissan fire & Marine Ins. Co. v. Fritz Companies, Inc., 210

1 F.3d 1099, 1105 (9th Cir. 2000).

2 Material facts which would preclude entry of summary
3 judgment are those which, under applicable substantive law, may
4 affect the outcome of the case. The substantive law will identify
5 which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.
6 242, 248 (1986). Questions of fact regarding immaterial issues
7 cannot defeat a motion for summary judgment. Reynolds v. County of
8 San Diego, 84 F.3d 1162, 1168-70 (9th Cir. 1996), rev'd on other
9 grounds by Acri v. Varian Associates, Inc., 114 F.3d 999 (9th Cir.
10 1997). A dispute as to a material fact is genuine if there is
11 sufficient evidence for a reasonable jury to return a verdict for
12 the nonmoving party. Anderson, 477 U.S. at 248.

13 B

14 1

15 In his Complaint, Plaintiff alleges that PBSP officials
16 violated his right to due process when they confiscated his cap and
17 shorts. In their pending motion for summary judgment, Defendants
18 argue that, because California prison regulations limit a prisoner's
19 right to possess property while in prison, Plaintiff had no right to
20 possess the cap and shorts in the first place, and that therefore
21 they are entitled to summary judgment as a matter of law on his due
22 process claim.

23 Prisons often ban or limit inmates' possession of certain
24 types of personal property while incarcerated. The Constitution
25 itself does not confer specific property interests. See Board of
26 Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). A

1 property interest that has been initially recognized and protected
 2 by state law may be protected under the Due Process Clause of the
 3 Fourteenth Amendment, however. See Paul v. Davis, 424 U.S. 693, 710
 4 (1976); Roth, 408 U.S. at 577 (protected property interests "stem
 5 from an independent source, such as state law -- rules or
 6 understandings that secure certain benefits and support claims of
 7 entitlement to those benefits."). To assert such an interest, there
 8 must be a "legitimate claim of entitlement to it." Id.

9 State law creates a "legitimate claim of entitlement" when
 10 it "imposes significant limitations on the discretion of the
 11 decision maker." Braswell v. Shoreline Fire Dep't, 622 F.3d 1099,
 12 1102 (9th Cir. 2010) (citation and internal quotation marks
 13 omitted). In other words, state law may create a protected property
 14 interest that may not be withdrawn without procedural safeguards
 15 only if mandatory language in the law substantively restricts the
 16 discretion of state officials. See Hewitt v. Helms, 459 U.S. 460,
 17 472 (1983); see, e.g., Castle Rock v. Gonzales, 545 U.S. 748, 755-66
 18 (2005) (finding no protected property interest in enforcement of
 19 restraining orders in part because relevant provisions of state law
 20 did not truly make enforcement of restraining orders mandatory);
 21 Bugler v. U.S. Bureau of Prisons, 65 F.3d 48, 50 (5th Cir. 1995)
 22 (finding no protected property interest in inmate UNICOR job
 23 assignments); Lyon v. Farrier, 730 F.2d 525, 527 (8th Cir. 1984) (no
 24 protected interest in property designated by prison as contraband);
 25 Arney v. Simmons, 923 F. Supp. 173, 177 (D. Kan. 1996) (no property
 26 interest in inmate benefit fund).

1 Hewitt's mandatory-language methodology may not apply to
 2 property interest claims by prisoners any longer. In Sandin v.
 3 Conner, 515 U.S. 472, 477-84 (1995), the Supreme Court expressly
 4 rejected Hewitt's methodology in the context of prison liberty
 5 interests. It held that a prisoner is entitled to procedural due
 6 process only if the restraint on his liberty of which he complains
 7 imposes "atypical and significant hardship on the inmate in relation
 8 to the ordinary incidents of prison life." Id. at 484. Courts are
 9 split on whether the rationale of Sandin should be extended to
 10 property interest claims arising from prison conditions. Compare
 11 Cosco v. Uphoff, 195 F.3d 1221, 1224 (10th Cir. 1999) (extending
 12 Sandin's atypical-and-significant-deprivation methodology to
 13 property claims by prisoners) and Abdul-Wadood v. Nathan, 91 F.3d
 14 1023, 1025 (7th Cir. 1996) (suggesting that Sandin applies to
 15 property interest claims brought by prisoners) with Bugler v. U.S.
 16 Bureau of Prisons, 65 F.3d 48, 50 (5th Cir. 1995) (declining to
 17 extend Sandin's methodology to property interest claims by
 18 prisoners) and Woodard v. Ohio Adult Parole Auth., 107 F.3d 1178,
 19 1182-83 (6th Cir. 1997) (noting that "the Supreme Court has made it
 20 clear that both state law and the Due Process Clause itself may
 21 create [a liberty] interest," while the prevailing doctrine
 22 instructs that "state law controls as to the existence of a property
 23 interest").
 24 The United States Court of Appeals for the Ninth Circuit,
 25 in two unpublished decisions, has suggested opposite results.
 26 Compare Martin v. Upchurch, 67 F.3d 307 (9th Cir. 1995) (concluding
 27

1 prisoner had no property interest in his prison job because state
 2 law left prisoners' employment to discretion of prison officials)
 3 (unpublished disposition) with Emil v. Crawford, 125 F. App'x 112,
 4 112-13 (9th Cir. Feb. 16, 2005) (citing Sandin's "atypical and
 5 significant hardship" language, the district court's dismissal of
 6 prisoner's action was proper "because his allegations--that he was
 7 charged for prescription drugs, including drugs he did not receive,
 8 that he was required to pay for copies, . . . and that he was denied
 9 canteen privileges--do not state a constitutional claim.")
 10 (unpublished disposition). However, unpublished opinions by the
 11 Ninth Circuit have no precedential effect. See 9th Cir. R. 36-3.

12 Because it is not clear from existing case law whether the
 13 rationale of Hewitt or Sandin should be applied to property interest
 14 claims arising from prison conditions, the Court will evaluate
 15 Plaintiff's claim under both standards.

16 Under Hewitt, state law may create a protected property
 17 interest that may not be withdrawn without procedural safeguards
 18 only if mandatory language in the law substantively restricts the
 19 discretion of state officials. See Hewitt, 459 U.S. at 472; Bugler,
 20 65 F.3d at 50 (no property interest in inmate UNICOR job
 21 assignments); Lyon v. Farrier, 730 F.2d 525, 527 (8th Cir. 1984) (no
 22 protected interest in property designated by prison as contraband);
 23 Owens v. Ayers, 2002 WL 73226, at *2 (N.D. Cal. Jan. 15, 2002) (no
 24 protected interest to property in prison in California); Arney v.
 25 Simmons, 923 F. Supp. 173, 177 (D. Kan. 1996) (no property interest
 26 in inmate benefit fund). In California, Plaintiff does not have a
 27
 28

general right to possess property in prison. California Code of Regulations, title 15, section 3192 provides that “[a]n inmate’s right to inherit, own, sell or convey real or personal property does not include the right to possess such property within the institutions/facilities of the department.” 15 C.C.R. § 3192 (2005). Several other sections of title 15 of the California Code of Regulations further limit a prisoner’s rights to personal property, including canteen, mail, and library privileges. See, e.g., 15 C.C.R. §§ 3090 et seq. (canteen privileges); §§ 3120 et seq. (library access); §§ 3130 et seq. (outside mail). Finally, PBSP Operational Procedure 806 specifically allows for disposal of property for which an inmate cannot pay shipping costs. Plaintiff does not cite any state law or prison regulation that authorizes or entitles him to possess personal property in prison.² Therefore, Plaintiff does not have a legitimate claim of entitlement to possess personal property in prison. Without such a property interest,

² Plaintiff asserts that, with regard to the cap, PBSP was required to provide him with a Notification of Disapproval Form pursuant to Operational Procedure 806, VI, C, 4. Doc. #76 at 7. This provision, however, only applies to disapproved books and publications. See Doc. #76 at 27. With regard to the shorts, Plaintiff asserts that PBSP was required to contact the vendor and request a UPS call tag in order to ship the item back at no cost to the inmate, pursuant to Operational Procedure 806, VI, K. Doc. #76 at 7. To the contrary, this provision, which is copied above in relevant part, states that staff "may" contact a vendor, but makes explicit that PBSP "shall not be a part of any discrepancies between the vendor and the purchaser" and that "all disputes are solely between the purchaser and the vendor and must be settled without additional involvement of PBSP and/or CDCR." See Doc. #76 at 43-44. Inexplicably, Plaintiff attaches several of the aforementioned portions of the California Code of Regulations and PBSP Operational Procedures to his opposition papers, which directly refute his argument that he has any claim of entitlement. See Doc. #76 at 24-84.

1 Plaintiff's due process claim based on a property interest fails as
 2 a matter of law.

3 Plaintiff's claim also fails as a matter of law under the
 4 Sandin analysis because PBSP's Operational Procedure, which imposes
 5 limited restrictions on an inmate's right to possess certain types
 6 of property, does not amount to an atypical or significant hardship
 7 as a matter of law. See Rahman X v. Morgan, 300 F.3d 970, 973-74
 8 (8th Cir. 2002) (no due process claim for deprivation of television,
 9 certain property, access to commissary and restrictions on outdoor
 10 exercise for twenty-six months); Cosco v. Uphoff, 195 F.3d 1221,
 11 1224 (10th Cir. 1999) (new prison regulation which limited the type
 12 and quantity of individual property in cells was not an atypical,
 13 significant deprivation); Frazier v. Coughlin, 81 F.3d 313, 317 (2d
 14 Cir. 1996) (loss of commissary, recreation, package, and telephone
 15 privileges did not amount to an atypical and significant
 16 deprivation); Bales v. Ault, 2004 WL 42647, at *6-7 (N.D. Iowa Jan.
 17 8, 2004) (deprivation of electric razor not atypical); Owens v.
 18 Ayers, 2002 WL 13226, at *5 (N.D. Cal. Jan. 15, 2002) ("Under
 19 Sandin, separating an inmate from his property for a mere three
 20 months would not amount to an atypical and significant hardship on
 21 the inmate in relation to the ordinary incidents of prison life.");
 22 Warren v. Irvin, 985 F. Supp. 350, 353 (W.D.N.Y. 1997) (denial of
 23 telephone, packages, commissary, earphones, movies, television, and
 24 third shower "does not represent the type of deprivation which could
 25 reasonably be viewed as imposing atypical and significant hardship
 26 on an inmate"). Again, to be clear, Plaintiff was deprived of a cap

1 and shorts. Given that deprivations of substantially larger
 2 property interests have been upheld under Sandin, the property loss
 3 at issue here plainly was not atypical or significant.

4 In sum, because Plaintiff did not have a possessory right
 5 to his shorts or cap while in prison, he was not entitled to due
 6 process, and Defendants are therefore entitled to summary judgment
 7 on this ground alone.

8 2

9 Even assuming a right that could be protected through the
 10 Due Process Clause, Plaintiff received all the process that would be
 11 due. The fundamental requirements of procedural due process are
 12 notice and an opportunity to be heard before the government may
 13 deprive a person of a protected interest. Cleveland Bd. of Educ. v.
 14 Loudermill, 470 U.S. 532, 542 (1985). The Ninth Circuit's decision
 15 in Nev. Dep't. of Corrections v. Greene, 648 F.3d 1014 (9th Cir.
 16 2011) is on point. In Greene, the Nevada Department of Corrections
 17 changed its policy, which change created a ban on inmate possession
 18 of typewriters. Id. at 1017. The ban was system-wide, and all
 19 inmates were notified of the new policy. Id. Inmates had the
 20 choice of shipping the typewriters out of the prison, donating the
 21 typewriters, or destroying them. Id. Even though the plaintiff
 22 inmate in Greene was not given an individual pre-deprivation
 23 hearing, the Ninth Circuit found that his due process rights were
 24 not violated because he had been notified of the ban and given ample
 25 time to comply with it. "With respect to the personal property of
 26 prisoners, that is all the process that is due." See id. at 1019;

27

28 15

1 see also Wolff v. McDonnell, 418 U.S. 539, 556 (1974) ("[T]he fact
2 that prisoners retain rights under the Due Process Clause in no way
3 implies that these rights are not subject to restrictions imposed by
4 the nature of the regime to which they have been lawfully
5 committed.").

6 Here, it is undisputed that Plaintiff had knowledge of
7 PBSP Operational Procedure 806 and that he knew the shorts and cap
8 would be destroyed if he did not pay the shipping costs within
9 thirty days of submitting the items for shipment. As discussed
10 above, Plaintiff admits he received a copy of Operational Procedure
11 806 and read it before even ordering the shorts and cap. As also
12 discussed above, when an inmate submits property for shipping, he is
13 notified of the shipping costs, and a thirty-day hold is placed on
14 the inmate's trust account to allow time to obtain the necessary
15 funds. If the funds are not available after thirty days, the
16 property is disposed of or donated. Here, Plaintiff asked to be
17 notified of any decision to destroy the items in his September 22,
18 2005 letter. In his January 10, March 28, and June 3, 2006 letters,
19 Plaintiff again inquired whether the shorts and cap had been
20 destroyed. These letters show that Plaintiff knew the shorts and
21 cap were subject to disposal.

22 Further, Plaintiff had ample time to pay the \$6.00
23 shipping fee in accordance with Operational Procedure 806.
24 Plaintiff sought to return the property on or around August 23,
25 2005. On September 9, 2005, PBSP informed Plaintiff that he did not
26 have sufficient funds. On December 2, 2005, PBSP informed Plaintiff

1 that the prison was unable to use his postage stamps to return the
2 items. On December 20, 2005, staff advised Plaintiff to seek funds
3 from another person. On January 5, 2006, Plaintiff was again
4 advised that he could not use postage to send out the items.
5 Ultimately, the shorts and cap were not destroyed until March 19,
6 2007, nearly nineteen months after Plaintiff sought to return them
7 to the vendor. This is far beyond the thirty days provided by
8 Operational Procedure 806.

9 In sum, Plaintiff had advance notice that the shorts and
10 cap were subject to destruction and had ample time to comply with
11 Operational Procedure 806 if he wanted the items shipped out.
12 This is all the process he was due. See Greene, 648 F.3d at 1019.

13 Indeed, although not required by Greene, Plaintiff also
14 had an opportunity to be heard through the inmate grievance process
15 before the items were destroyed. In California, inmates may
16 administratively appeal "any policy, decision, action, condition, or
17 omission by the department or its staff." 15 C.C.R. § 3084(a).
18 Plaintiff could have filed a grievance concerning prison policy
19 relating to the confiscation and mail-out requirements as soon as he
20 submitted them for return to the vendor on August 23, 2005. Instead
21 he waited until June 4, 2006 to submit his mail-out appeal. This
22 was screened out as untimely. In sum, although he failed to
23 properly utilize the grievance process, the process was available to
24 him and offered him the opportunity to be heard before the property

1 was destroyed.³

2 Accordingly, Defendants are entitled to summary judgment
3 on Plaintiff's remaining due process claim.

4 C

5 Defendants argue, in the alternative, that summary
6 judgment is warranted because they are entitled to qualified
7 immunity from Plaintiff's remaining due process claim. The defense
8 of qualified immunity protects "government officials . . . from
9 liability for civil damages insofar as their conduct does not
10 violate clearly established statutory or constitutional rights of
11 which a reasonable person would have known." Harlow v. Fitzgerald,
12 457 U.S. 800, 818 (1982). The threshold question in qualified
13 immunity analysis is: "Taken in the light most favorable to the
14 party asserting the injury, do the facts alleged show the officer's
15 conduct violated a constitutional right?" Saucier v. Katz, 533 U.S.
16 194, 201 (2001). A court considering a claim of qualified immunity
17 must determine whether the plaintiff has alleged the deprivation of
18 an actual constitutional right and whether such right was "clearly
19 established." Pearson v. Callahan, 555 U.S. 223, 236 (2009)
20 (overruling the sequence of the two-part test that required
21 determination of a deprivation first and then whether such right was
22 clearly established, as required by Saucier, and holding that court
23 may exercise its discretion in deciding which prong to address first
24

25 ³ The Ninth Circuit's order remanding the case did not reverse
26 this Court's finding that the mail-out appeal was unexhausted.
27 Rather, the Ninth Circuit remanded for a determination of whether the
property destruction appeal, which was pursued through a separate
grievance, was exhausted or subject to improper screening.

1 in light of the particular circumstances of each case). Where there
2 is no clearly established law that certain conduct constitutes a
3 constitutional violation, a defendant cannot be on notice that such
4 conduct is unlawful. Rodis v. County of San Francisco, 558 F.3d
5 964, 970-71 (9th Cir. 2009). The relevant, dispositive inquiry in
6 determining whether a right is clearly established is whether it
7 would be clear to a reasonable officer that his conduct was unlawful
8 in the situation he confronted. Saucier, 533 U.S. at 202.

9 Viewing the evidence in the light most favorable to
10 Plaintiff, the Court has determined above that Defendants' actions
11 did not amount to a due process violation, as Plaintiff failed to
12 raise a triable issue of fact as to (1) whether he had a property
13 right implicating the Due Process Clause; and (2) assuming he had
14 such a right, whether he was given the process due.

15 Assuming arguendo there was a constitutional violation,
16 the Court nonetheless concludes that it would not have been clear to
17 a reasonable officer that the destruction of the cap and shorts
18 would be considered unlawful. As detailed above, California inmates
19 have no constitutional right to possess property while in prison.
20 Roth, 408 U.S. at 577; 15 C.C.R. § 3192. Further, considering that
21 the fundamental requirements of procedural due process are notice
22 and an opportunity to be heard, no reasonable officer would have
23 believed he was violating Plaintiff's due process by (1) notifying
24 him that his property would be destroyed if he did not pay the
25 shipping costs, and (2) providing him ample time to respond.
26 Loudermill, 470 U.S. at 542. Indeed, Plaintiff was provided almost

1 nineteen months to come up with the \$6.00 shipping fee. This is
2 significantly more time than the thirty days provided by the PBSP
3 Operational Procedure. See, e.g., Neal v. Shimoda, 131 F.3d 818,
4 832 (9th Cir. 1997) (prison officials entitled to qualified immunity
5 where no reasonable prison official would have reason to know that
6 undisputed classification procedures violated due process).
7 Plaintiff points to no law or policy, nor is the Court aware of any,
8 that would have put Defendants on notice that their actions would be
9 clearly unlawful. Accordingly, the Court finds Defendants are
10 entitled to summary judgment on the alternative ground of qualified
11 immunity.⁴

12 IV

13 For the foregoing reasons, Defendants' motion for summary
14 judgment after remand (Doc. #58) is GRANTED. The Clerk is directed
15 to terminate any pending motions as moot, enter judgment in
16 accordance with this Order, and close the file.

17 IT IS SO ORDERED.

18
19 DATED 08/20/2014



20
21
22
23
24
25
26
27
28
THELTON E. HENDERSON
United States District Judge

G:\PRO-SE\TEH\CR.08\Schrubb-08-2986- MSJ 2.wpd

⁴ In his opposition, Plaintiff claims that certain defendants violated Plaintiff's right to use the United States Postal Service. The Court does not reach Plaintiff's claim as he failed to raise the claim in his Complaint. Nor does the Court reach Plaintiff's equal protection arguments given that the Ninth Circuit affirmed this Court's earlier grant of summary judgment on the equal protection claims.